In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1494

ROBERT MAHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a pre-indictment delay of 23 months deprived him of due process of law, that the trial court erred in refusing to grant his motion for continuance made on the morning of the trial, and that prosecution on one of the two counts on which he was convicted was barred by double jeopardy or collateral estoppel.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of two counts of selling heroin, in violation of 21 U.S.C. (1964 ed.) 173 and 174. He was sentenced to ten years' imprisonment and fined $5,000 on each count, the sentences and fines to be concurrent. The court of appeals affirmed (Pet. App. 16).

The facts are undisputed. They establish that in February and March of 1971 petitioner made two sales of heroin to Doris and Santiago Olivero (T. 113-115, 122-124). Doris Olivero was the government's principal witness at

trial. The day after the second sale, Mrs. Olivero turned the heroin over to New York police (T. 125-126), and it was produced at trial; however, because the government did not adequately prove the chain of custody, the court ruled the heroin inadmissible and instructed the jury to disregard it (T. 349).

1. Petitioner contends that the delay of about 23 months between the date of the last overt act charged in the conspiracy count[1] and the date on which the indictment was returned deprived him of due process. This contention is without merit.

While this Court recognized in *United States* v. *Marion*, 404 U.S. 307, that in some circumstances pre-indictment delay may amount to a denial of due process, it further stated that, absent a showing of actual prejudice in the conduct of the trial and intentional delay by the government to gain a tactical advantage, no such denial is shown. *Id.* at 324, 325. Since there is no suggestion in this case that the period of delay resulted in prejudice to petitioner or that the delay was caused by such an improper motive on the part of the government, there was no denial of due process.

Petitioner's only complaint is that the pre-indictment delay caused the fading of memory on the part of the government's principal witness, Doris Olivero (Pet. 9). However, this factor would normally hurt the government's case and not the defendant's. This is especially true where, as here, petitioner's defense was a blanket denial of the charges (T. 462). Petitioner does not allege any prejudice arising from inability to locate witnesses or to secure evidence; nor does he claim that the delay affected his ability

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[1]The jury was unable to reach a verdict on the conspiracy count and on two other counts involving sales of heroin; a mistrial was granted as to those counts.

to recall the events surrounding these charges. Under the circumstances, the pre-indictment delay did not deprive petitioner of a fair trial.

2. Petitioner contends that the trial court committed reversible error by refusing to grant his motion for a continuance made just prior to trial.

Petitioner was arraigned on October 23, 1973, and was represented at that time by an attorney. This attorney suffered a heart attack shortly after the arraignment, and at that time the case was referred to his associate, Paul Victor, Esq. On the morning of the trial, Monday, November 12, 1973, Stephen Russo, Esq., informed the court that he had been retained by petitioner the preceding Thursday (November 8, 1973) and would be representing petitioner (T. 4-5). Mr. Russo's motion for a continuance of one week was denied (T. 6-7). Mr. Victor did appear, and both he and Mr. Russo were present during the trial (T. 19-20).

In his request for a continuance, although he stated vaguely that he was unable to find certain witnesses, that he wanted to do some investigation, and that he had not had enough time to review the government's Section 3500 material (T. 5-6), Mr. Russo also stated (T. 6):

> * * * I am in a position where I can try the case. I am conversant with essential facts * * *.

The court noted that counsel normally does not receive Section 3500 material until after the witness testified (T. 7) and pointed out that petitioner had had time to substitute counsel if he so desired without waiting until just before the trial (T. 19-20).

Mr. Victor had been granted access to almost all of the government's Section 3500 material a full week prior to trial and had spent hours reviewing the material

and making notes. Mr. Russo had also been granted access to a portion of these materials on the Friday preceding the trial (T. 7). Petitioner had the benefit of the counsel of both Mr. Victor and Mr. Russo at trial.

Under these circumstances, there was clearly no abuse of the court's discretion in denying petitioner's last minute request for a continuance. *United States* v. *Rosenthal*, 470 F. 2d 837, 844 (C.A. 2), certiorari denied, 412 U.S. 909; *United States ex rel. Baskerville* v. *Deegan*, 428 F. 2d 714, 716-717 (C.A. 2), certiorari denied, 400 U.S. 928. See *Ungar* v. *Sarafite*, 376 U.S. 575, 589.

3. After his arrest by New York City detectives in March 1971, petitioner was indicted by a New York State grand jury on charges of conspiracy and possession of heroin. The heroin allegedly possessed was the same heroin that had been sold to Doris Olivero, and which underlay Count Five of the federal indictment. Doris Olivero testified at the state trial, and the facts were essentially the same as those to which she testified with respect to Count Five in the trial in this case.

At the conclusion of the State's case, the New York court entered an order dismissing the charges pursuant to Section 290.10 of the New York Criminal Procedure Law (McKinney, 1971, Vol. 11A), on the ground that the evidence produced was not legally sufficient to establish the offenses charged (C.A. App. 13).

Petitioner contends that the conviction below on Count Five was barred by the double jeopardy clause or alternatively, that the government was collaterally estopped from introducing against him the evidence which had

been presented at the New York trial.[2] Whatever the merits of petitioner's double jeopardy and collateral estoppel claims, they do not affect his conviction under Count Four, as petitioner recognizes (Pet. 12). Since the sentence received on Count Five was identical with and concurrent to the sentence received on Count Four, there is no occasion for the Court to reach this contention. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16. In any event, petitioner's claims are without merit.

A prior state trial does not bar a subsequent federal prosecution for the same offense. *Abbate* v. *United States*, 359 U.S. 187, 193-196. Similarly, a prior state acquittal does not collaterally estop the United States, which was not a party to the prior proceeding, from contesting facts previously determined in the defendant's favor. *Martin* v. *Rose*, 481 F. 2d 658, 660 (C.A. 6), certiorari denied, 414 U.S. 876; *United States* v. *Feinberg*, 383 F. 2d 60, 71 (C.A. 2), certiorari denied, 389 U.S. 1044.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

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[2]The evidence referred to is the testimony of Doris Olivero; the heroin itself was not admitted at the federal trial.

[3]Petitioner's reliance on *Harris* v. *Washington*, 404 U.S. 55, for the proposition that collateral estoppel is operable between state and federal jurisdictions (Pet. 12) is misplaced. That case involved two subsequent state prosecutions.

Although under the circumstances we deem it unnecessary to discuss the issue, the United States does not concede that the New York dismissal for legally insufficient evidence resulted in a fact determination in petitioner's favor.